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Nos. 02-1773, 02-1776, 02-1778, 02-1784

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In The
Supreme Court of the United States

SUK YOON KIM, on behalf of himself and all others similarly situated,

Petitioner,

v.

ISHIKAWAJIMA HARIMA HEAVY INDUSTRIES, LTD., *et al.*,

Respondents.

[Additional Captions On Inside Cover]

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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13 pp

No. 02-1776

LESTER I. TENNEY, *et al.*,

Petitioners,

v.

MITSUI & CO., LTD., *et al.*,

Respondents.

No. 02-1778

ZHENHUAN MA, SHANG-TING SUNG, AIZHU SU, and CHUNSHENG TIAN, on behalf of themselves and all others similarly situated,

Petitioners,

vs.

KAJIMA CORPORATION, *et al.*,

Respondents.

No. 02-1784

ALBERTO SALDAJENO, *et al.*,

Petitioners,

v.

ISHIHARA SANGYO KAISHA LTD., *et al.*,

Respondents.

TABLE OF CONTENTS

	Page
INTEREST OF THE STATE OF CALIFORNIA AS AMICUS CURIAE	1
SUMMARY OF ARGUMENT	2
ARGUMENT	4
I. THE LOWER COURT'S DECISION UPSETS THE BALANCE OF POWER BETWEEN THE STATES AND THE FEDERAL GOVERNMENT BY UNDULY ENCROACHING UPON THE STATES' SOVEREIGN POWERS	4
II. THIS CASE PRESENTS AN OPPORTUNITY TO FURTHER CLARIFY THE FOREIGN AFFAIRS DOCTRINE ON A MATTER OF HISTORIC IMPORTANCE	7
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES

Am. Ins. Ass'n v. Garamendi, 539 U.S. ___, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003) 1, 3, 7, 8

Chase Securities Corp. v. Donaldson, 325 U.S. 304 (1945) 4

Deutsch v. Turner, 324 F.3d 692 (9th Cir. 2003) 1, 2, 3

Gregory v. Ashcroft, 501 U.S. 452 (1991) 4

Mitsubishi Materials Corp. v. Superior Court, 106 Cal.App.4th 39, 130 Cal.Rptr.2d 734 (2003), review granted, depublished, 133 Cal.Rptr.2d 147 (2003) 5

Sun Oil v. Wortman, 486 U.S. 717 (1988) 4, 5, 6

Taiheiyo Cement Corp. v. Superior Court, 105 Cal.App.4th 398, 129 Cal.Rptr.2d 451 (2003), review granted, depublished, 133 Cal.Rptr. 2d 147 (2003) 5

Zschernig v. Miller, 389 U.S. 429 (1968) 6, 7, 8

UNITED STATES CONSTITUTION

art. X 4

CALIFORNIA CONSTITUTION

art. V, § 13 2

STATUTES

Cal. Code Civ. Proc. § 354.6 ..... 2, 3, 4, 5, 6

Cal. Ins. Code §§ 13800 et seq. 7

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The State of California as amicus curiae files this brief pursuant to Rule 37 of the Rules of the Supreme Court of the United States.

INTEREST OF THE STATE OF CALIFORNIA AS AMICUS CURIAE

The Attorney General of the State of California submits this amicus curiae brief in support of the petition for writ of certiorari filed by petitioners urging the Court to grant certiorari of the Ninth Circuit's decision in *Deutsch v. Turner*, 324 F.3d 692 (9th Cir. 2003). In that decision, the Ninth Circuit struck down a California statute extending the limitations period for claims for unpaid wages and injury owed to slave laborers forced to work for private companies during World War II. The Court of Appeals found the California statute, which provides a forum for the adjudication of such claims, to violate the foreign affairs provisions of the United States Constitution. The Ninth Circuit's overly expansive interpretation of the foreign affairs doctrine is at odds with this Court's recent analysis of the foreign affairs doctrine in *Am. Ins. Ass'n v. Garamendi*, 539 U.S. ___, 123 S. Ct. 2374, 156 L. Ed. 2d 376 (2003). The lower court ruling, moreover, has far-reaching implications for the sovereignty of the States. Absent guidance from the Court, the lower court's decision will impede the ability of States to enact legislation in areas of traditional state competence.

As California's chief law officer (see CAL. CONST. art. V, § 13), the Attorney General has a strong interest in defending the validity of this important and historic legislation, which compels him to urge review of the lower court's decision. Accordingly, the Attorney General submits this brief in support of these four petitions, all of which seek certiorari of the Ninth Circuit's decision.

SUMMARY OF ARGUMENT

The State of California urges review of *Deutsch v. Turner* because of the important, indeed historic, interests at stake and the wide-ranging harm that may be caused by the Ninth Circuit's misapplication of the foreign affairs doctrine.

The statute at issue, California Code of Civil Procedure section 354.6 ("Section 354.6"), is state legislation that has traditionally been deemed within the authority and province of the States to enact, namely, the extension of a statute of limitations and the provision of a state forum for the litigation of tort-related grievances. In this case, that state authority has been applied to a matter of undeniable importance, claims for unpaid wages and injury owed to slave laborers who were forced to work for private companies during World War II.

The Ninth Circuit below, however, held that Section 354.6 violates the foreign affairs provision of the United States Constitution. The Ninth Circuit reached this decision by applying a novel and unworkable standard, namely, that state regulation of "matters related to war" violates the foreign affairs doctrine, regardless of the

absence of a conflicting federal statute or treaty, regardless of how incidental or tangential the nexus between the statute and foreign affairs powers might be, and regardless of the importance of the State's countervailing interest underlying the statute.

The lower court's unprecedented and expansive standard jeopardizes the States' sovereign interests in this important matter and, further, will impair the ability of States to enact legislation in areas of traditional state competence.

Moreover, certiorari is warranted, not simply because the *Deutsch* decision is at odds with *Garamendi*, but also because *Garamendi* does not fully resolve the unique and important questions presented here.

ARGUMENT

I. THE LOWER COURT'S DECISION UPSETS THE BALANCE OF POWER BETWEEN THE STATES AND THE FEDERAL GOVERNMENT BY UNDULY ENCROACHING UPON THE STATES' SOVEREIGN POWERS.

The Ninth Circuit's expansion of the foreign affairs doctrine undermines California's sovereignty in an area of state interest that is centuries old.

"[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457 (1991). "The powers not delegated to the United States Constitution, nor prohibited to it by the states, are reserved to the states respectively, or to the people." U.S. CONST. art. X.

"Within this system, the Federal Government is vested with limited powers, while the States retain substantial sovereign authority." *Gregory v. Ashcroft*, 501 U.S. at 457. This federalist system requires a proper balance between the States and the Federal Government. "In the tension between federal and state power lies the promise of liberty." *Id.* at 459.

In 1999, the California Legislature exercised this sovereignty by enacting Section 354.6, an emergency measure that extends the limitations period for a defined class of claims relating to forced or slave labor performed prior to and during World War II.

Statutes of limitations are creatures of legislative grace, subject to a relatively large degree of legislative control. *Chase Securities Corp. v. Donaldson,* 325 U.S. 304, 314 (1945). As the Court noted in *Sun Oil v. Wortman*, 486

U.S. 717 (1988), "a State's interest in regulating the workload of its courts and determining when a claim is too stale to be adjudicated certainly suffices to give it legislative jurisdiction to control the remedies available in its courts by imposing statutes of limitations." 486 U.S. at 730.

Accordingly, like the statute of limitations in *Sun Oil,* Section 354.6 is a valid exercise of California's sovereign authority to assess the workload of its courts and extend its own limitations periods to the types of claims identified in Section 354.6.

The magnitude of the compelling state interests underlying the enactment of Section 354.6 cannot be overstated. The horrors suffered by petitioners and numerous other persons before and during the Second World War who were subject to slavery at the hands of private corporations has not been seen since. Hopefully, it will not reoccur in our lifetimes or those of our children. The sheer gravity of harms, and the unique place these harms occupy in history, should compel the Court, at a minimum, to rectify the Ninth Circuit's sweeping construction of the foreign affairs doctrine.[1]

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[1] The importance of this issue to the State of California is illustrated by the fact that the California Supreme Court has accepted review of California appellate decisions addressing California Code of Civil Procedure section 354.6 and the claims brought pursuant to the statute. See *Mitsubishi Materials Corp. v. Superior Court*, 106 Cal.App.4th 39, 130 Cal.Rptr.2d 734 (2003), review granted, depublished, 133 Cal.Rptr.2d 147 (2003); *Taiheiyo Cement Corp. v. Superior Court*, 105 Cal.App.4th 398, 129 Cal.Rptr.2d 451 (2003), review granted, depublished, 133 Cal.Rptr. 2d 147 (2003).

The California Legislature, recognizing the unspeakable anguish suffered by these slave laborers, exercised its sovereign powers in enacting a law that extends the limitations period and provides a forum in California courts for claims for lost wages and personal injury suffered by these slave laborers. As noted above, the State of California acted wholly within its sovereign powers in regulating its limitations period. *Sun Oil v. Wortman*, 486 U.S. at 722.

An equally compelling state interest underlying the California Legislature's actions was its desire to ensure that companies doing business within California, who avail themselves of the benefits of California's economy, compensate workers such as the slave laborers who toiled for those companies before and during the Second World War.

Despite these compelling state interests and California's legitimate exercise of its sovereignty, the Ninth Circuit invalidated Section 354.6, based upon a novel and highly questionable application of foreign affairs preemption.

Rather than applying the various tests set forth in *Zschernig v. Miller*, 389 U.S. 429 (1968), and without the guidance of *Garamendi*, the Ninth Circuit interprets the foreign affairs provisions implicit in the Constitution as primarily concerning war or designed to prevent war. 324 F.3d at 711. Although the Ninth Circuit characterizes "the power to make and resolve war, including the resolution of claims arising out of such actions," as a subset of the foreign affairs powers, it impliedly rejects the nuanced analysis of foreign affairs preemption previously articulated by this Court in *Zschernig*. *Id.* at 712. Instead, the

Ninth Circuit sweepingly declares off-limits to the States "matters related to war . . . ," without analyzing the nexus of the state regulation to foreign affairs, the impact of the regulation upon foreign affairs, and the existence of any conflicting federal treaty or statute. *Id.*

The State of California respectfully submits that this "matters related to war" standard is rife with ambiguity. Unless rejected or clarified, it will result in an unwarranted erosion of state sovereign powers, in areas of traditional state competence.

II. THIS CASE PRESENTS AN OPPORTUNITY TO FURTHER CLARIFY THE FOREIGN AFFAIRS DOCTRINE ON A MATTER OF HISTORIC IMPORTANCE.

In addition to the confusion and disharmony created by the *Deutsch* court's decision, certiorari is warranted because these cases present an opportunity for the Court to clarify the foreign affairs preemption doctrine. In *Garamendi*, the Court's most recent treatment of this still unsettled doctrine, the Court ruled based upon the facts presented it, leaving for another day questions regarding the full scope of this doctrine.

Specifically, in *Garamendi,* this Court addressed California's Holocaust Victim Insurance Relief Act of 1999 ("HVIRA"), Cal. Ins. Code §§ 13800 et seq., which required any insurer doing business in California to disclose information about all policies the business or anyone related to the business sold in Europe between 1920 and 1945. Finding an actual and "sufficiently clear" conflict between the terms of the HVIRA and the President's foreign policy as expressed in executive agreements such as the German

Foundation Agreement and in statements by high-level Executive Branch statements, the Court held that the reporting provision at issue in HVIRA was preempted under the foreign affairs doctrine. *Garamendi*, 123 S.Ct. 2374, 2390-2392. The Court thus based its decision on conflict preemption within the foreign affairs doctrine, without needing to resolve the larger question of what standard to apply in the absence of an actual conflict.

Because it recognized an actual conflict, this Court in *Garamendi* appropriately deferred for another day the "fair question whether respect for the executive foreign relations power requires a categorical choice between the contrasting theories of field and conflict preemption evident in the *Zschernig* opinions, . . . " *Garamendi*, 123 S.Ct. 2374, 2389 (footnote omitted).

In contrast, all petitioners in these cases now before the Court assert there is no conflict between their claims and any treaties or executive agreements. Indeed, in none of these cases is the German Foundation Agreement, relied upon by this Court in *Garamendi,* applicable.

Accordingly, these cases present the Court with the opportunity to complete the foreign affairs analysis it began in *Garamendi*. In doing so, the Court can and should address the appropriate standard to apply where, unlike the facts presented in *Garamendi*, a "sufficiently clear" conflict is not present. In this manner, the Court can clarify *Zschernig's* current relevance in defining foreign affairs preemption.

CONCLUSION

For the foregoing reasons, the State of California respectfully urges the Court to grant certiorari.

Respectfully submitted,

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August 4, 2003